

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

Global NAPS Petition for Declaratory
Ruling and Alternative Petition for
Preemption to the Pennsylvania, New
Hampshire and Maryland State Commissions

WC Docket 10-60

COMMENTS OF TVC ALBANY, INC.

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Table of Contents

	<u>Page</u>
I. PRELIMINARY STATEMENT	1
II. BACKGROUND OF THE NEW YORK STATE PROCEEDING	3
III. THE COMMISSION SHOULD REJECT THE RELIEF SOUGHT BY GNAPs, AND INSTEAD DECLARE THAT ANY TDM TRAFFIC, DELIVERED BY GNAPs DIRECTLY OR INDIRECTLY TO A TERMINATING LEC, IS SUBJECT TO ACCESS CHARGES	6
POINT A: This Commission Has Not Pre-Empted Application Of Intrastate Access Charges on TDM Traffic from GNAPs	7
POINT B: GNAPs Is Not An Intermediate Carrier, And Not Exempt From Access Charges	11
POINT C: GNAPs Has The Burden Of Demonstrating The Jurisdiction Of Each Call	14
POINT D: The Telecom Act Does Not Preclude Assessing Access Charges On Traffic From GNAPs	17
POINT E: Section 253 Of The Telecom Act Does Not Preclude Assessing Access Charges On GNAPs	20
IV. CONCLUSION	21

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TVC Albany, Inc. (TVC), through its attorney, hereby responds to the Public Notice released March 18, 2010 herein (DA 10-461), and respectfully offers the following comments on the Petition for Declaratory Ruling filed by Global NAPs, Inc., on March 5, 2010.

I. PRELIMINARY STATEMENT

TVC Albany, Inc. (TVC) is a Delaware corporation doing business as Tech Valley Communications. TVC is a Competitive Local Exchange Carrier (CLEC), and provides facilities-based local exchange service, high capacity fiber optic services, and resold long distance services, in the Greater Albany, New York area. TVC possesses a Certificate of Public Convenience and Necessity issued by the New York State Public Service Commission (PSC) on May 7, 1997.

Since early 2007, TVC has sought to obtain the assistance of the PSC in having GNAPs compensate TVC for the termination of intrastate toll calls delivered by

GNAPs to TVC pursuant to TVC's intrastate access tariff.¹ In March, 2008, the New York PSC issued an Order holding that nomadic VOIP interconnected traffic was jurisdictionally interstate, and accordingly GNAPs' delivery of VOIP traffic, originated by entities other than GNAPs, would not be subject to TVC's intrastate access tariffs.²

As a result of the PSC's order, TVC is forced to terminate toll traffic for the benefit of GNAPs, at considerable expense to TVC, without any meaningful compensation. This gives GNAPs a "free ride", and subjects other IXC's, which responsibly pay access charges, to unjust and unreasonable discrimination, prejudice and disadvantage.

While TVC strongly opposes the particular relief sought here by GNAPs, it does agree with GNAPs in one important respect: This Commission should promptly act to eliminate the uncertainty, and the inconsistent results throughout the country, by issuing a clear determination on whether carriers such as GNAPs must pay terminating intrastate access charges to local exchange carriers which terminate intrastate toll traffic delivered by GNAPs.³ For the reasons set forth below, this Commission should hold that GNAPs is responsible for such payment.

¹ In New York, intrastate access charges of CLECs are limited by PSC rule to the comparable intrastate access rate charged by Verizon New York. TVC complies with that requirement.

² New York PSC Case 07-C-0059 – Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges, "Order Directing Negotiation", issued and effective March 20, 2008 (TVC Order).

³ While GNAPs argues in its petition it should not pay any intrastate access charges because its traffic is jurisdictionally interstate, it also claims immunity from interstate access charges.

II. BACKGROUND OF THE NEW YORK STATE PROCEEDING

The PSC's Order of March 20, 2008, was based on this Commission's Minnesota Vonage Order⁴, in which, according to the PSC, this Commission "determined, in part, that nomadic VOIP services provided by Vonage should be deemed exclusively interstate for jurisdictional purposes". The New York Commission concluded that "the FCC's determination arguably applies to similar VOIP-to-VOIP, VOIP-to-landline and landline-to-VOIP calls (interconnected VOIP calls) because the VOIP part of the call is not confined to the geographic location associated with the customer's billing address or assigned telephone number."

The PSC went on, however, to state that it "has a long history of insuring that the one carrier's use of another's network is not without reasonable compensation", and further confirmed "Any telecommunications carrier that delivers traffic over the public switched network (PSTN) for another carrier can reasonably be expected to be compensated irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network." (TVC Order, pp. 15-16).

The PSC concluded by directing GNAPs and TVC to enter into private contract negotiations "on the rates, charges, terms and conditions for the exchange of nomadic VOIP traffic". But because GNAPs had no incentive whatsoever to agree to negotiate, or to make any payment to TVC, those "negotiations", not surprisingly, went nowhere.

⁴ Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket 03-211, 19 FCC Rcd. 22404, November 12, 2004.

In early 2010, in connection with an effort at mediation by the PSC, GNAPs alleged that, based on the local interconnection agreements in New York between Verizon and AT&T, and between Verizon and Level 3, the “prevailing” rate for termination of VOIP traffic in New York was \$0.00045 per minute. TVC strongly disputed there was any such “prevailing” rate.⁵ Nonetheless, perhaps because it was embarrassed by its use of TVC’s network without making any payment whatsoever, GNAPs, on its own, decided to make a small payment to TVC for traffic GNAPs claimed was VOIP, at the rate of \$0.00045, which GNAPs had unilaterally deemed to be the proper rate. TVC accepted that small payment from GNAPs, without waiver or prejudice, making abundantly clear TVC did not accept the GNAPs’ rate as proper, and that GNAPs remained liable to TVC for the difference between the small payment made by GNAPs and TVC’s applicable access rates.

⁵ The Verizon/AT&T, and Verizon/Level 3 Interconnection Agreements do not establish a “prevailing” – or mutually agreed upon – rate for VOIP traffic. Each party reserves its rights as to the correct rate. There is a minimum required payment of approximately \$0.0004 per MOU until such time as the FCC establishes a proper rate, and that FCC rate will or may be applied retroactively (depending on the agreement). There are, however, other Interconnection Agreements in place in New York where there are no special provisions for VOIP, thus potentially subjecting VOIP traffic to access charges. For example, TVC reads the March 10, 2006 Interconnection Agreement between Verizon New York and YMax (which TVC understands transports traffic for Magic Jack) as not having any special provision for VOIP toll traffic, thus subjecting it to applicable access tariffs.

GNAPs made a similar argument about a “prevailing rate” in both Vermont and Pennsylvania. However, in Vermont, the Vermont Public Service Board expressed its skepticism, stating “GNAPs acknowledged at the evidentiary hearing that GNAPs has staked out a position about interconnection compensation for VOIP traffic for which there is no settled consensus.” Petition of Global NAPs for Declaratory Judgment and Request for Interim Relief, Docket 7556, “Order Denying Preliminary Injunction”, November 24, 2009, at pg. 8.

GNAPs has inaccurately reported the results of the TVC Order in its chart on page 4 of the Petition. While GNAPs correctly reports that the PSC found that under the Minnesota Vonage Order, the intrastate tariff claims had to be dismissed, its assertion that the Commission determined “GNAPs to pay special VOIP rate” is wholly inaccurate.

The New York Commission never made any determination that GNAPs was entitled to a special VOIP termination rate. It simply held that TVC’s New York intrastate access tariff would not apply to interstate traffic, and made no other determination.

Nor can the TVC Order be read as confirming that all of GNAPs’ traffic in New York was nomadic VOIP. While the PSC stated that “Staff has advised that it appears from the evidence submitted by GNAPs most, if not all, the traffic GNAPs sends to the TVC network for termination is nomadic VOIP”, that assertion was really never tested. It was based solely on non-sworn, self-serving letters from attorneys for two of GNAPs’ customers (such as Transcom), not to the PSC, but to GNAPs itself; those letters were not as definitive as GNAPs would have either the PSC or this Commission believe.

Much more likely to be reflective of the actual practice in New York are the facts developed through an evidentiary hearing in the Palmerton proceeding before the Pennsylvania PUC,⁶ and before the New Hampshire PUC in the Hollis Telephone proceeding,⁷ where it was clear that not all of the GNAPs’ traffic was nomadic VOIP.

⁶ Complaint of Palmerton Telephone Company v. Global NAPs South, Inc., et al., Docket C-2009-2093336, Opinion and Order, March 16, 2010 (Commission decision overturning prior Initial Decision of ALJ).

⁷ Hollis Telephone, Inc., et al., Docket DT 08-028, “Order Addressing Petition for Authority to Block the Termination of Traffic from Global NAPs Inc.”, November 10, 2009.

Thus, the Pennsylvania PUC cited a special traffic study conducted by Palmerton Telephone Company which showed that “GNAPs indirectly transports and terminates at Palmerton’s PSTN facilities calls of various categories and originating protocols including ILEC, CLEC, cable company (i.e., fixed interconnected VOIP or IP-enabled), wireless and nomadic VOIP”. Palmerton, page 31.

At the present time, negotiations with GNAPs are at an impasse, and TVC has pending a request to the PSC that it allow TVC to block calls to and from GNAPs due to its failure to make payment. In the meantime, TVC continues to be compelled to terminate TDM traffic received from GNAPs without receiving anything but token (and grossly inadequate) compensation.

III. THE COMMISSION SHOULD REJECT THE RELIEF SOUGHT BY GNAPs, AND INSTEAD DECLARE THAT ANY TDM TRAFFIC, DELIVERED BY GNAPs DIRECTLY OR INDIRECTLY TO A TERMINATING LEC, IS SUBJECT TO ACCESS CHARGES

What this Commission needs to address is the underlying business strategy of GNAPs, pursuant to which it offers to transport, as an IXC, massive amounts of third or fourth party “VOIP traffic” to a local exchange carrier for termination to that LEC’s end users. GNAPs makes huge sums of money from entities which originate that traffic, but when it comes time for GNAPs to pay the appropriate fee to the terminating LECs, GNAPs laughs in their faces. The GNAPs’ business strategy is to pocket whatever money it can, for its sole pecuniary advantage, and to unjustly enrich itself, at the expense of the LEC which incurs costs to terminate traffic from GNAPs.

GNAPs offers various reasons why it should not be required to pay access charges to terminating LECs. It argues this Commission has pre-empted any possible state jurisdiction over access charges for intrastate traffic; that it is not possible to know whether VOIP toll traffic is interstate or intrastate; that it is immune from paying access charges because of its alleged status as an “intermediate carrier”; that the Telecom Act does not permit any access charge (whether interstate or intrastate) to be applied to VOIP toll traffic; that GNAPs is not an interexchange carrier; and that allowing imposition of access charges on VOIP traffic would be “catastrophic” to VOIP technology and result in VOIP carriers refusing to carry traffic to rural areas of the country.

None of those excuses is valid. GNAPs has engaged in every possible contortion (and distortion) of the interstices of this Commission’s intercarrier compensation arrangements, and has gotten away with its banditry far too long. It is time to put a stop to GNAPs’ outrageous manipulation and gaming of the regulatory process.

POINT A: This Commission Has Not Pre-Empted Application Of Intrastate Access Charges on TDM Traffic from GNAPs

Much of GNAPs’ argument is based upon the pre-emption established in this Commission’s Minnesota Vonage Order. That claim is misplaced.

While it is true this Commission has pre-empted state regulatory jurisdiction over nomadic VOIP service, that does not mean it has exempted VOIP intrastate toll calls from state access tariffs. At issue in the Minnesota Vonage Order was whether the Minnesota Department of Commerce could require Vonage to comply with “state laws and regulations governing a ‘telephone company’”, including such things as obtaining operating authority, filing tariffs, and the provision and funding of 911

emergency services. This Commission precluded the assertion of such state regulatory authority.

Nowhere did this Commission state that intrastate access charges would not be applicable to intrastate VOIP toll calls. Indeed, whether or not access charges apply has nothing to do with whether an entity originating traffic is itself subject to state regulatory jurisdiction; the focus is on whether the IXC actually delivering toll traffic to a terminating LEC is a telecommunications carrier, and if it is, access charges apply.

Thus, for example, an individual homeowner who initiates a long distance telephone call is not an entity regulated either by this Commission or by the New York PSC. Yet, when an interexchange carrier delivers that homeowner's toll call to a terminating LEC, access charges apply and are assessed to the IXC. Similarly, under New York law, cellular carriers are not subject to regulation by the PSC. Nonetheless, if a cellular carrier originates a wireless call in Buffalo, to be terminated to a local exchange carrier customer in New York City (which is not in the same MTA as Buffalo), access charges apply to whatever IXC actually carries the traffic from Buffalo to the LEC in New York City.

As another example, an entity which originates and delivers "fixed" VOIP toll calls to a LEC for termination pays access charges, even if the originator of the fixed VOIP traffic is not regulated as a telecom provider.

What is critical in the case of GNAPs is that it itself admittedly has no end user customers (Petition, pg. 2); thus, it does not originate VOIP calls from its own end users, and does not terminate VOIP calls to its own end users. Instead, GNAPs is simply

an interexchange carrier which transports traffic from distant cities and delivers it in TDM format to LECs for termination.

Holding GNAPs responsible, as an interexchange carrier, for access charges imposed by the terminating LEC, is nothing startling, unique or new. Traditionally, a long distance call may be transferred among several interconnected transport providers before it is finally delivered by the “last interexchange carrier” to either a LEC tandem or a LEC terminating end office. In either case, the “last” interexchange carrier is the one which pays access charges, and that last interexchange carrier builds the terminating access charges into the rates it charges the upstream IXC in the extended transmission path.⁸

It is important for this Commission to understand exactly what role GNAPs plays in the delivery of calls which originate in VOIP format to a terminating LEC. GNAPs is understandably reluctant to get into those details in its petition, but the facts, as presented by GNAPs, do not show it is an enhanced service provider, or even a transporter of calls in IP format.

A VOIP call originates with a VOIP provider such as Vonage, in IP format at the end user’s premises. That call is transmitted, in IP format, over the public internet, to a Vonage gateway. That is the only certainty on how a GNAPs’ call is transported after that. Once the call reaches Vonage, it is not clear if the call is transported

⁸ Contrary to GNAPs’ claim, to be an IXC subject to access charges, a carrier need not collect revenues directly from its own end user customers. That is not the rule in a network where one IXC frequently delivers traffic to another IXC for termination, or in the resale context where the underlying facilities-based carrier is not the end user’s presubscribed IXC. If Time Warner teaches anything, it is that a wholesale carrier “in the middle” will be held liable for charges assessed by a terminating LEC.

downstream in IP format, or whether it is converted by Vonage to TDM before it is delivered by Vonage to another carrier, such as Transcom or one of its other customers listed by GNAPs on page 2 of its petition⁹. One of those carriers delivers the call to GNAPs, and GNAPs transports the call to a Verizon toll tandem where it is routed by Verizon to a terminating LEC. But it is not clear whether those IXC customers transport the call in IP or TDM format, or how GNAPs handles the call, other than handing it off to Verizon or a LEC in TDM format.

GNAPs may be nothing more than a TDM carrier. It may receive a call in TDM format from an upstream ESP or IXC, and transport that TDM call, between exchanges, to a Verizon tandem to which a LEC subtends. For example, in a Memorandum prepared by an attorney for GNAPs, dated June 22, 2005, and sent to a billing agent for LECs in New York (to defend GNAPs' refusal to pay access charges), GNAPs confirms it receives traffic from ESPs such as Vonage in TDM format:

“The routing of traffic from the Internet to the PSTN, and vice versa, is accomplished in a two-step process: first (for the out-bound transmission path from the ESP customer to a POTS phone), the IP data packets associated with the customer's conversation are routed over the Internet to one of ESP's servers, where they are then handed to a special computer that transforms the IP data packets into the format (also known as “protocol”) of the PSTN. The ESP then hands the call off to a telephone company, in this case

⁹ The Pennsylvania PUC found in Palmerton (at pg. 37-38) that the traffic received by GNAPs from Transcom was not enhanced traffic.

Global, which establishes the connection between the ESP's Internet servers and the end-user's telephone on the PSTN. This process works in both directions, i.e., for inbound and outbound traffic."¹⁰ (emphasis added).

GNAPs does not deliver IP traffic to Verizon and does not deliver IP traffic to the LEC; it simply delivers TDM traffic, as the "last IXC", to Verizon. When and where the conversion from IP to TDM occurs is not clear. And accordingly, GNAPs is not itself a VOIP carrier, but simply a telecommunications carrier transporting TDM format messages to a LEC for termination. That requires GNAPs to pay terminating access charges.

POINT B: GNAPs IS NOT AN INTERMEDIATE CARRIER, AND NOT EXEMPT FROM ACCESS CHARGES

GNAPs' claim that it is an "intermediate carrier", and thus exempt from paying the terminating LEC, under authority of this Commission's Time Warner decision, totally misconstrues Time Warner.¹¹

Time Warner addressed solely the question of whether a wholesale carrier (in that case MCI and Sprint Communications), which carried local traffic originated by a VOIP provider (Time Warner) was entitled to interconnect with an Incumbent LEC. The issue was interconnection of local service under Section 251, and nothing else. Toll

¹⁰ Memorandum from Jim Scheltens, attorney for GNAPs, to Mary Goralski of New York Access Billing, LLC, June 22, 2005, at pg. 5. (Relevant pages attached).

¹¹ In the Matter of Time Warner Cable Request for a Declaratory Ruling, WC Docket 06-55, DA 07-709, "Memorandum Opinion and Order", March 1, 2007.

service, and delivery of toll traffic from a distant originator, by an interexchange carrier to a LEC for termination, was not involved.

Indeed, Time Warner actually undercuts GNAPs' claim that it is exempt from paying to terminate traffic. In Time Warner, this Commission specifically held that a wholesale carrier delivering VOIP traffic to a LEC was responsible for compensating the LEC for the termination of traffic, and that the payment of such compensation by the wholesale provider was an explicit condition to allowing interconnection. Time Warner at para. 17. The intercarrier compensation to be paid by the wholesale carrier included both reciprocal compensation (for local traffic) and exchange access for toll traffic. Time Warner, footnote 53.¹²

GNAPs is also incorrect in citing Time Warner for the proposition that the compensation to be paid by the wholesale provider for toll access service can only be pursuant to "arms length negotiations", as opposed to tariffs. Nowhere is that stated in Time Warner.

Claiming that compensation can be determined only through "arms length negotiation" is typical of GNAPs' disingenuous arguments. As occurred in New York, GNAPs has absolutely no incentive to negotiate in good faith over an appropriate termination rate. GNAPs bases its business plan on its claim that no matter how obstinate it may be, the state public utility commissions have no authority to arbitrate interconnection agreements between GNAPs and a CLEC under Sections 251 and 252, or

¹² Typical of GNAPs' tactics is its reliance on Time Warner before this Commission (as it did in New York), but in a recent proceeding before the Georgia PSC, GNAPs argued the Commission should not rely on Time Warner because it involved a §251 agreement, not a tariff arrangement. See discussion in Palmerton at 23-24, quoting New Hampshire PSC Order in Blue Ridge complaint against Global NAPs.

otherwise direct GNAPs to pay access charges. GNAPs has absolutely nothing to lose by adamantly refusing to make any payment; it simply confronts every state agency with the claim the state has no authority to compel it to pay anything. Thus, the game goes on, with GNAPs laughing at this Commission, the state PUCs, and the LECs it is forcing to terminate GNAPs' traffic without compensation. To GNAPs, the free ride never ends.

GNAPs makes the bald statement, on page 29 of its petition, that "this Commission has declared on three occasions that intermediate carriers of VOIP traffic are not subject to access tariffs, but only to negotiated charges under 47 USC Section 251." The alleged "three occasions" are an FCC Press Release dated November 26, 2004; Time Warner at para. 17; and the AT&T IP-in-the-Middle Order,¹³ at footnote 92. None of those hold what GNAPs claims.

First, the Press Release in question certainly does not have the status of an FCC Order. Next, as described above, nothing in paragraph 17 of Time Warner even uses the words "intermediate carrier", and nowhere states that such "intermediate carriers" are exempt from access charges. Moreover, as described above, GNAPs has already argued elsewhere (before the Georgia PSC) that Time Warner is not applicable.

Third, GNAPs is not supported by footnote 92 of the AT&T-in-the-Middle Order. Footnote 92 states that, with respect to access charges, such charges are assessed against interexchange carriers "and not against any intermediate LECs that may hand off the traffic to the terminating LECs..." The footnote is directed to the typical situation where an IXC delivers a toll call to a LEC's (usually an ILEC's) tandem, with the call

¹³ In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, FCC WC Docket No. 02-361, FCC 04-97 (released April 21, 2004) ("IP-in-the-Middle").

routed through the tandem to the terminating LEC. That is a typical access Meet Point Billing arrangement, where both the terminating LEC, and the ILEC providing tandem service, issue access charge bills to the IXC for the respective access charge rate elements provided by the LEC and the ILEC. The terminating LEC does not bill the tandem provider (the intermediate LEC) for call termination.

GNAPs is no intermediate LEC. By its own admission, GNAPs has no end user customers, and does not provide local exchange service; it is therefore not any type of LEC. The fact it may be certificated as a CLEC is of no import; the functions it is providing, with respect to Vonage and other VOIP originators, are those of an IXC, not a LEC.

POINT C: GNAPs Has The Burden Of Demonstrating The Jurisdiction Of Each Call

GNAPs asserts that, because the traffic it carries originated with VOIP providers, and that because such calls could originate at any point in the world, it is not possible to know whether a VOIP call is an interstate or intrastate call. That is neither correct nor a sufficient excuse for allowing GNAPs to escape all responsibility for paying any access charge, state or interstate.

The need to determine whether traffic is jurisdictionally interstate or intrastate, based upon the originating and terminating locations, is not new. Traditional long distance carriers have always had the same issue, and until recent times, solved the absence of individual call record data by using proxies based on traffic studies. Thus, where an IXC was unable to send specific real time data in call streams to enable a LEC

to rate an access call as interstate or intrastate, the IXC's were required to perform periodic traffic studies, and, based on the results, file Percentage Interstate Use (PIU) factors, on a periodic basis, with Local Exchange Carriers. Access bills were issued based on these PIUs.

Similar problems existed with cellular calls, where until very recently the exact point of origination of a cell call may not have been known. The problem was solved in various ways, including conducting traffic studies, or use of sourcing laws, as is done in the tax arena, by deeming the point of origination as the place "where the mobile telecommunications customer's place of primary use is located, regardless of where the mobile telecommunications service originates, terminates or passes through".¹⁴

For jurisdictional purposes, this Commission has allowed wireless carriers to utilize "safe harbor" allocations to divide their mobile services into jurisdictionally interstate and intrastate portions, for determination of Universal Service Fund contributions.¹⁵

The Commission has similarly allowed interconnected VOIP carriers to determine the jurisdictional nature of their traffic, for Universal Service Fund purposes, by either conducting traffic studies or by utilizing a "safe harbor" percentage assigning 64.9% of traffic as jurisdictionally interstate.¹⁶

¹⁴ New York Mobile Sourcing Statute, Tax Law Section 1111(L)(3)(B).

¹⁵ Federal-State Joint Board on Universal Service, CC Docket 96-45, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 13 FCC Rcd. 21252 at 21258, para. 11.

¹⁶ Report and Order and Notice of Proposed Rulemaking, Universal Service Contribution Methodology, 21 FCC Rcd. 7518 affirmed in part and reversed in part, Vonage Holdings Corp. v. FCC, 489 F.3d 1232 (D.C. Circ. 2007)

No reason exists why the same process can't be used to determine the portion of VOIP traffic which is to be deemed jurisdictionally interstate, and subject to interstate access charges, and the portion to be deemed intrastate, subject to intrastate access charges.

While GNAPs asserts the nomadic feature of VOIP traffic means a call can originate "from anywhere", any assertion that vast amounts of such traffic are actually originated at a location other than the primary point of use should be taken with a very large grain of salt. While it is theoretically possible for a VOIP subscriber to physically carry his or her IP terminal equipment on a trip, and originate IP calls from a different location, the realities suggest very little of VOIP traffic actually originates in this "mobile context". First, of course, is the reality that business travelers will use their cell phones for long distance calls, and not go through the delay (and possible connection charges) of establishing high speed connections to the public internet. Second, the mass marketing of VOIP services to residential consumers by such providers as Vonage and Magic Jack suggests massive amounts of VOIP traffic is not nomadic, but instead tied to a residential or small business address. TVC believes that a study of the actual points of origination by Vonage and Magic Jack customers will show very little of that traffic actually originates at a location other than the location of primary use.

For E-911 purposes, a VOIP provider must use a data-base which shows the physical location of every VOIP phone, regardless of the telephone number. Moreover, the VOIP provider knows when a VOIP customer utilizes service "in transit mode", and the temporary location of "transit" use. That is because this Commission has

required VOIP users to register themselves when they are in a location other than their normal point of use, in order to assure accurate E-911 emergency coverage.¹⁷

Thus, under this Commission's own rules, a VOIP provider is required to be fully aware of the location from which a "nomadic" VOIP call is originating. Accordingly, no reason exists why VOIP traffic cannot be properly allocated between interstate and intrastate jurisdictions, based either on actual real time call data, or through use of traffic studies comparable to the PIU studies utilized for separating traditional toll traffic into interstate and intrastate jurisdictions.

POINT D: The Telecom Act Does Not Preclude Assessing Access Charges On Traffic From GNAPs

GNAPs asserts that under the 1996 Act, "reciprocal compensation is the norm; access charges apply only where there is a 'pre-act obligation relating to inter-carrier compensation'."¹⁸ It then goes on to argue that since "VOIP was not developed at the time the Act was implemented", it cannot be subject to access charges.

First, GNAPs is simply wrong because the access charges at issue here are not being assessed upon the actual VOIP provider, such as Vonage, but rather upon an IXC which delivers traffic in TDM format to a Local Exchange Carrier for termination. TDM traffic did, of course, exist prior to 1996, and was delivered by IXCs to LECs prior to 1996; nothing in the Act, and nothing in this Commission's prior decisions, allows an

¹⁷ IP-Enabled Services and E911 Requirements for IP-Enabled Service Providers, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Red. 10245, June 3, 2005).

¹⁸ Petition, page 21, citing WorldCom, Inc. v. FCC, 288 F.3d 429 at 433 (D.C. Circuit, 2002). But, of course, WorldCom case dealt with local dial-up traffic to the Internet, not toll traffic from the Internet, which is the case in VOIP terminations by LECs.

interexchange carrier such as GNAPs which delivers interexchange TDM traffic to a LEC, to escape the compensation obligations which fall upon all of its competitors.¹⁹

While GNAPs asserts it is entitled to claim the ESP exemption established by this Commission in 1983, that simply is not correct. First, GNAPs admitted to the Pennsylvania PUC that it is not an “enhanced service” or “information service provider (ISP)”, and that it does not itself engage in any alleged “enhancement” of the traffic it transports. Palmerton, p. 32. Rightly so, since GNAPs does not meet the definition of Enhanced Service Provider set forth in statute or this Commission’s regulations.

Section 64.702(a) of the Commission’s regulations defines enhanced service as a service “offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber’s transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.”

GNAPs does none of this. It simply accepts traffic from one of its upstream IXC customers, transports those messages between exchanges, and delivers them, in TDM format, to an ILEC tandem or a LEC end office for termination to a LEC’s end user customer. That is precisely what an interexchange carrier does when it receives

¹⁹ The GNAPs theory would exempt “fixed” VOIP providers from access charges, since “fixed” VOIP did not exist prior to 1996. But no claim for such exemption has ever (to TVC’s knowledge) been recognized. No reason exists to treat fixed VOIP any different from nomadic VOIP, especially when most of what is alleged to be nomadic is, in reality, fixed.

traffic in TDM format from either an originating Local Exchange Carrier or an upstream IXC. GNAPs is no different, and must be treated the same.²⁰

Indeed, as the California PSC has held in requiring GNAPs to pay access charges, to the extent the ESP exemption applies at all, it only applies to ISP-bound traffic, not traffic which is ISP-originated. See Matter of Cox California Telecom LLC v. Global NAPs California, Inc., Case 06-04-026, “Opinion Granting Complainant’s Motion for Summary Judgment”, Decision 07-01-004, January 11, 2007.²¹

During litigation before the New York PSC on the TVC complaint, GNAPs itself acknowledged “the issue of whether VOIP traffic should be subject to switched access charges at all has not been determined”.²²

Nothing has changed since Global NAPs’ admission, and no reason exists for this Commission to now adopt a sweeping proposition which grossly undercuts the development of competition in telecommunications, and results in undue discrimination between carriers based solely on the technology utilized to transport long distance traffic. As the New York PSC itself has argued to this Commission, different terminating rates, depending on whether “a call originates or terminates with an IP-connected telecommunications carrier, as opposed to solely riding on PSTN facilities”, would “result in two separate and distinct rates for exactly the same function”, and would not be

²⁰ Notably, the New York PSC TVC Order, heralded by GNAPs, rejected the GNAPs’ claim it was entitled to assert the ESP exemption. TVC Order, page 15, footnote 22.

²¹ The California PSC also rejected the Global NAPs’ claim that it was exempt from access charges because it was an “intermediate carrier” which did not originate the traffic.

²² New York PSC Case 07-C-0059, Formal Complaint of TVC Albany, Inc. against Global NAPs, Answer of Global NAPs, February 8, 2007, at page 6.

proper because it “is not technologically neutral; it favors one technology over another, resulting in asymmetrical compensation and possibly triggering inefficient investment and deployment decisions”.²³

POINT E: Section 253 Of The Telecom Act Does Not Preclude Assessing Access Charges On GNAPs

GNAPs asserts Section 253 of the Telecom Act, which prohibits states from erecting barriers to entry, precludes the assessment of intrastate access charges on GNAPs’ traffic. That is simply wrong.²⁴

First, GNAPs has not shown that subjecting its jurisdictionally intrastate long distance traffic to intrastate access charges will have any impact on either the viability of VOIP service in general, or GNAPs’ ability to provide telecom services in New York or any other state. All other IXC’s which deliver traffic in TDM format to LECs for termination are required to pay access charges, and they remain in business. GNAPs is no different, and, moreover, is not entitled to receive a competitive advantage over other providers of toll service.

Nor has it been shown that the assessment of access charges would destroy the ability of a VOIP originator, such as Vonage, to offer telecom services. Indeed, users

²³ In the Matter of Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waiver Regarding Access Charges and the “ESP Exemption”, WC Docket 08-152, Comments of the New York Public Service Commission, at pg. 2 (Undated).

²⁴ It is more than ironic (and way past hypocritical) that GNAPs relies on Section 253, which by its own terms precludes a state from “prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service...,” while at the same time proclaiming that the service it provides is not telecommunications. GNAPs is wrong on both counts. The transport services it provides, as an interexchange carrier, are in fact telecommunications services; and subjecting it to access charges will not prohibit GNAPs from offering service. See FCC Pole Attachment Decisions, cited in Palmerton, at pg. 10, holding that offering a transmission path needed to provide internet service is a telecommunications service if offered by a common carrier.

of VOIP are now required to pay significant monthly charges (higher than telephone access line charges) for the high speed broadband internet access needed to initiate IP calls over the public internet, and those broadband connection costs have not stopped the mass market appeal of Vonage or Magic Jack. GNAPs has not shown that the inclusion of standard access charges, which other long distance customers must absorb, would force the shut-down the entire VOIP industry.

Moreover, GNAPs misunderstands the scope of Section 253. In order to be set aside, a state action must not just affect the offering of telecommunications, such as by potentially increasing the retail cost, but instead a plaintiff “must show actual or effective prohibition, rather than the mere possibility of prohibition.” Level 3 Communications v. City of St. Louis, 477 F.3d 528 (8th Circ. 2007), which is the same standard that has been adopted in the Ninth Circuit. See Sprint Telephony PCS v. County of San Diego, 543 F.3d 571, CA-9, September 11, 2008. Nowhere has GNAPs shown that subjecting it to access charges, as are all other interexchange carriers, would absolutely prohibit it from operation in any state.

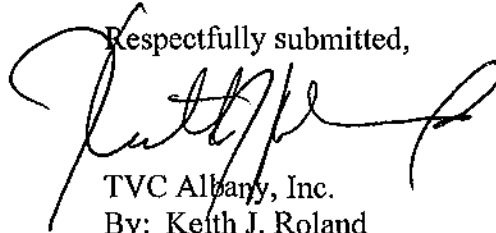
IV. CONCLUSION

GNAPs and its brethren are the Somali pirates of the telecommunications market. They earn huge fees from VOIP service providers, and upstream IXC, for transporting toll traffic to LECs for termination. Those LECs incur costs in that termination, yet GNAPs haughtily demands a free ride. GNAPs has gotten away with this far too long, and it is time for this Commission to put an end to this banditry.

GNAPs condemns the legitimate demands of terminating LECs for proper compensation, characterizing itself as a victim of "intrastate tariff-hungry ICOs".

(Petition, page 31). Global NAPs needs to look in the mirror. The victims here are the Local Exchange Carriers, and all their customers, who have suffered long enough from the arrogance and contemptuous conduct of GNAPs. It is time for that to come to an end.

Respectfully submitted,



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Dated: Albany, New York
April 2, 2010

To: Mary Gorlaski
FROM: Jim Scheltema
DATE: June 22, 2005
RE: **Assessment of Access Charges on Global's VoIP Traffic is Improper**

I. INTRODUCTION.

The NYAB and Global NAPs seek the resolution of all outstanding billing disputes between them. Among these disputes is the issue of the treatment of traffic using voice over Internet protocol ("VoIP"), particularly traffic originated by enhanced service providers ("ESPs") which are Global's customers.¹

NYAB has asked Global to address the increasingly complex questions of fact, public policy and law associated with the development of new telecommunications technologies and services sometimes referred to as Voice Over Internet Protocol or "VoIP" which are currently being considered by the Federal Communications Commission ("FCC"). As demonstrated below, this traffic is not currently subject to access charges, but may, in future, be subject to such charges. The FCC has, in fact, indicated both its willingness and perhaps its insistence on resolving compensation related disputes regarding this traffic. The FCC is expected to make some

¹ The term "enhanced service" is defined at 47 CFR § 67.702(a) as follows:

For the purpose of this subpart, the term enhanced service shall refer to services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under title II of the Act.

See also 47 USC § 153(20).

conversion from an Internet protocol ("IP") or asynchronous transfer mode ("ATM") to more traditionally exchanged signals used by the PSTN.

All signals leave and enter the ESP customer's premise in IP format and are routed over the third-party ISP's broadband Internet connection, and thereafter over the public Internet to one of the ESP's Internet servers, which may or may not reside within the NYAB carriers' service territories. The Internet data packets that comprise the transmissions are indistinguishable from other Internet traffic, such as those carrying e-mail, chat, instant messaging, or communications to and from servers on the World Wide Web.

The ESP customers can communicate with each other over the Internet (just like e-mail or instant messaging), as many do, or with plain old telephone service ("POTS") users on the PSTN. Global's facilities are required by ESPs to provide this last service.

The routing of traffic from the Internet to the PSTN, and vice versa, is accomplished in a two-step process: first (for the out-bound transmission path from the ESP customer to a POTS phone), the IP data packets associated with the customer's conversation are routed over the Internet to one of ESP's servers, where they are then handed to a special computer that transforms the IP data packets into the format (also known as "protocol") of the PSTN. The ESP then hands the call off to a telephone company, in this case Global, which establishes the connection between the ESP's Internet servers and the end-user's telephone on the PSTN. This process works in both directions, *i.e.*, for in-bound and out-bound traffic.

This service also makes it possible for users on the PSTN to dial ordinary 10-digit telephone numbers and "call" the ESP's customers on the Internet. Because PSTN users